Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of Implementation of Section 302 of the Telecommunications Act of 1996 Open Video Systems	CS Docket No. 96-46

COMMENTS

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Pursuant to the Notice of Proposed Rulemaking ("NPRM") released by the Commission in the above captioned proceeding, American Cable Entertainment; Bresnan Communications Co., Ltd.; Greater Media, Inc.; Cable Telecommunications Association of Georgia; Cable Telephone Association of Maryland, Deleware and the District of Columbia; New Jersey Cable Telecommunications Association; Ohio Cable Telecommunications Association; South Carolina Cable Television Association; Tennessee Cable Television Association; Texas Cable & Telecommunications Association; Wisconsin Cable Communications Association ("Commenters"), hereby submit the following comments

INTRODUCTION AND SUMMARY

In 1990, the Commission began a proceeding to implement an idea for a new kind of video delivery system. The Commission called it video dialtone, or VDT. Under the Commission's concept, local exchange carriers ("LECs") would lease capacity on technologically advanced systems to multiple video programmers and packagers. These new systems were intended to advance the public interest in diverse media voices and enhance the development of competition in the video programming market by being "open" to all programmers or packagers of programming who would offer their services over a single system. This was significantly different from the traditional cable television model, where a single, franchised programming packager controlled the facilities and selected all of the programming offered on the system. Video dialtone, by contrast, would be like numerous unfranchised program providers all competing with each other, as well as existing cable operators. The initial problem with the Commission's video dialtone scheme, however, was that the LECs could not fulfill their demand to participate as programmers on their own systems. That limitation was due to the Cable Act's cross-ownership ban, and because doing so would make them cable operators and the system a cable system. Elimination of the cross-ownership ban resolved some of the problems, but the Commission recognized that telco affiliates could not participate as programmers on video dialtone systems without cable franchises.

Due to technical and legal complications, such as the LECs' desire to participate as programmers on video dialtone systems and unavailability of digital

transmission equipment, the Commission's video dialtone scheme was slow to reach practical implementation. In enacting the Telecommunications Act of 1996,[1] Congress recognized the public interest benefits that could be derived from an "open" video system, and thus retained the fundamental concept of a video system that is open to all programmers on non-discriminatory terms. In an effort to overcome some of the delays in the Commission's video dialtone scheme, however, Congress crafted a new option, which it called an "Open Video System" ("OVS").

Under the 1996 Act, OVSs are subject to reduced regulatory burdens — stated in particularity in the Act — on the grounds that competition and market forces brought about by such systems would relieve the need for complete government oversight. Congress chose, however, not to completely exempt OVSs from oversight and regulation. Indeed, Congress required that the Commission impose a strict non-discrimination requirement on OVS operators. Section 653 states that OVS operators must be prohibited from "discriminating among video programming providers with regard to carriage on [their] open video system[s]. . . ."[2] This language leaves no room for claims that only "unreasonable" discrimination is prohibited. Congress recognized that without a strong restraint on the OVS operator's power over the system, the promise of an "open" video system would be lost. Indeed, Congress' concern that OVS operators not be given complete control and oversight of the system is manifest in the requirement that the Commission adopt rules regulating several critical issues.

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[1] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 ("1996 Act" or "Act").

[2] 1996 Act § 653(b)(1)(A).

For example, the price paid by programmers for carriage on OVSs cannot be left to the operator and "market forces," as the Commission is required to adopt rules ensuring that rates for carriage are "just and reasonable and not unjustly or unreasonably discriminatory."[3]

Moreover, the Commission must recognize that when Congress stated that it intended to provide LECs flexibility in entry into the video services market, it meant that LECs should have several entry options from which to choose. Congress did not intend for the Commission to revamp the OVS scheme so that LECs would gain the benefit of reduced regulatory burdens while retaining the control of traditional cable operators. Indeed, closing an open video system under the guise of providing "flexibility" would undermine the rationale for OVS. Congress has provided LECs with the option of controlling the programming and programmers carried on their system; they are given the option of becoming cable operators, subject to Title VI of the Communications Act.

Finally, Congress intended that existing cable operators, indeed, any person, be allowed to either operate an OVS or provide services on a LEC-owned OVS. First, the language of the Act provides cable operators and all other persons the right to provide video services via an OVS. That language does not mandate whose OVS the cable operator must utilize. Accordingly, it could be the cable operator turning its system into an OVS, or it could be a cable operator choosing to obtain carriage on an OVS owned by a LEC or some other party. Second, it would be a violation of the First Amendment and Equal Protection

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[3] 1996 Act § 653(b)(1)(A).

component of the Fifth Amendment to prohibit cable operators from choosing to speak through the vehicle of OVS rather than through a traditional cable system. LECs are given the choice, and their is no reason for denying the choice to present cable operators.

I. THE COMMISSION MUST ENSURE FAIR COMPETITION BY ADOPTING SPECIFIC REGULATIONS IMPLEMENTING OVS OBLIGATIONS AND LIMITATIONS TO CREATE TRULY "OPEN" VIDEO SYSTEMS

Commenters are concerned that the Commission's proposal to minimize oversight by committing critical programming, pricing, and cost allocation decisions to LEC OVS operators will allow anticompetitive and discriminatory conduct to go unchecked. At best, a "hands-off" approach will only delay the tough decisions the Commission must make because it will be flooded with complaints from programmers and competitors after the systems become operational. While it is clear that Congress intended the Commission to be deregulatory, it still expected the Commission to be diligent — just be quick about it.

It is also obvious that Congress' distaste for the VDT process and rules means that the Commission can not simply reinstate the old VDT rules or pursue the old VDT rulemakings. However, the Commission cannot forget the lessons learned from the VDT experience. The Commission accepted the obligation to resolve the method by which costs should be allocated where LECs deploy video and voice plant upgrades over joint facilities. In the Video Dialtone Recon Order, the Commission stated that when providing open video systems, "LECs may have an incentive to understate the direct costs of the service in order to

set unreasonably low prices and engage in cross-subsidization."[4] Indeed, recognizing such potential problems, the Commission was set to resolve the cost allocation issue in relation to the Dover Township, New Jersey video dialtone tariff.[5]

In the same vein, the new Act expressly prohibits cross-subsidy and also directs the Commission to establish necessary cost allocation rules. Without a tariff proceeding for OVS, the Commission *must* establish some cost allocation rules or Congress' mandate to prevent cross subsidy will be ignored. A process for evaluating the reasonableness and justness of rates must be adopted before the systems are certified and operational.

The Commission can avoid the old VDT delays without abdicating oversight. The Commission can establish generic rules on cross-subsidy and cost allocation that will protect competition. As proposed, however, handing over the regulatory responsibilities to the LEC OVS operators is neither good policy nor consistent with the 1996 Act itself. Indeed, the Commission is not free to "forbear" from imposing the regulations required under Section 653 of the Act, and should not even if legally allowed to do so. Section 401 of the 1996 Act creates a new Section 10 of the Communications Act that allows the Commission to forbear

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[4] *Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54-63.58*, Memorandum Opinion and Order on Reconsideration and Third Further Notice of Proposed Rulemaking, 10 FCC Rcd. 244, ¶ 216 (1994).

[5] *Bell Atlantic Tel. Cos., Transmittal Nos. 741, 786 Revisions to Tariff FCC No. 10*, Order, DA 95-1285 (Com. Car. Bur. June 9, 1995); *Bell Atlantic Tel. Cos., Transmittal Nos. 741, 786 Revisions to Tariff FCC No. 10*, Order Designating Issues For Investigation, DA 95-1928 (Com.Car. Bur. Sept. 8, 1995).

from applying regulations, if the Commission determines that: (1) enforcement is not necessary to ensure the charges, practices, classifications, or regulations of a telecommunications service provider are just and reasonable and not unjustly or unreasonably discriminatory; (2) enforcement is not necessary for the protection of consumers; *and* (3) forbearance is consistent with the public interest.[6] The impact of competition can only be considered by the Commission in satisfying the "public interest" portion of that test.[7]

The Commission is unable to satisfy all the elements of Section 10 for any of the 1996 Act's OVS regulations. For example, regarding rates, the Commission has no basis for finding that enforcement is not necessary to assure the justness and reasonableness of OVS carriage rates, as no such rates have even been established, much less analyzed in light of the OVS provider's costs. Similarly, the Commission has no basis for determining that enforcement of the anti-discrimination provisions are not necessary for the protection of consumers (*i.e.*, programmer/packagers). Indeed, if Congress had believed that the regulations enumerated in Section 653 were not immediately necessary — *i.e.* if they were available for forbearance — it would not have bothered to include them in the Act. The Commission must allow OVS to develop under the Commission's nurturing oversight before it can comfortably deregulate its operation.

Forbearance may ultimately make good economic and regulatory sense when

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[6] 1996 Act § 401 (a) (to be codified at 47 U.S.C. § 160(a)).

[7] 1996 Act § 401(b).

the Commission has gained experience with LEC OVS operations and the LECs' monopoly over the local exchange is eliminated. But for now, given the Commission's experience with open platforms via VDT, and the obvious incentives to discriminate and cross subsidize, the Commission must proactively prohibit opportunities for misconduct and make OVS what it is supposed to be — a broadband platform equally open to all, not just a preferred affiliate. If preference is sought, then LECs can limit their access obligations, assume the other Title VI obligations, and become franchised cable operators. If LECs want the control without the franchise, then they can become MMDS or DBS operators. But if a LEC wants to construct a wired delivery system, then it must choose between the cable and OVS options; and the choice must be based on meaningful distinctions. Allowing an unfranchised OVS system to look and act like a unfranchised cable system is wrong and inconsistent with the 1996 Act.

II. THE ANTI-DISCRIMINATION PROVISION OF SECTION 653 PROHIBITS OVS OPERATORS FROM EXERCISING CONTROL OVER THE ALLOCATION OF CHANNELS AND THE IDENTITY OF PROGRAMMER-CUSTOMERS

Section 653 of the new Act requires the Commission to prohibit OVS operators from "discriminating among video programming providers with regard to carriage on [the operator's] open video system."[8] The meaning of that Section is clear: OVS operators cannot discriminate *in any manner* among programmers seeking to and leasing capacity on the OVS system. Yet, in the NPRM, the Commission tentatively concludes that OVS operators can discriminate among programmers by allocating the capacity on the OVS system themselves.[9]

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[8] 1996 Act § 653(b)(1)(A).

[9] NPRM, ¶ 11.

The Commission does not explain its rationale for that tentative conclusion, but it appears the Commission bases it on a desire to facilitate "flexible market entry."[10] The Commission also seems prepared to allow LECs to exercise control over the identity of programmer-customers leasing capacity on the LEC's OVS under the guise of "flexibility."[11] Further, the Commission suggests that it can promote flexibility and entry into OVS for LECs by dealing with claims of discrimination in *post hoc* complaint proceedings, thus avoiding adopting any specific rules.[12] Both the Commission's interpretation of Section 653 and its concept of "flexible market entry" are incorrect.

A. Section 653 Requires That OVS Operators Be Prohibited From Exercising Influence Or Control Over Channel Allocation

Unlike other Sections of the Communications Act, both old and new, Section 653 contains no modifying language allowing for discrimination that is not unreasonable.[13] Section 653 requires the Commission to impose an absolute prohibition on discrimination of any kind by OVS operators. Determining which programmers receive what amount of capacity, and at what numerical channel position, inherently involves discriminating among programmers competing for capacity on an OVS. Indeed, allocating capacity to different programmers is essentially "selecting" the programming to be offered on the system. Accordingly, the Commission is incorrect in its tentative conclusion that Section 653 does not

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[10] NPRM, ¶¶ 10-11.

[11] NPRM, ¶ 15.

[12] NPRM, ¶¶ 12-13.

[13] *See, e.g.*, 47 U.S.C. §§ 201, 202.

prohibit OVS operators from engaging in the allocation of capacity among programmers.

The Commission must clarify that Section 653's anti-discrimination provision requires programmer-affiliates of an OVS operator to obtain capacity, in non-oversubscription situations, on the same terms and under the same conditions as unaffiliated programmers. The language of Section 653 states that an OVS operator must be prohibited "from discriminating among video programming providers with regard to carriage. . . ." It does not state that OVS operators must be prohibited only from discriminating among unaffiliated programmers. The Commission's rules, therefore, must explicitly state that programmers affiliated with the OVS operator must be allocated capacity under the same terms and conditions as unaffiliated programmers, except in situations where demand exceeds capacity — where the dictates of Section 653(b)(1)(B) would control.

Moreover, the Commission must apply this anti-discrimination rule to "channel sharing" situations. The 1996 Act requires the Commission to allow channel sharing, but the Act does not permit OVS operators to control channel sharing entirely. While OVS operators can choose whether to utilize channel sharing, the Commission must adopt specific rules regarding the use of those channels. Once again, choosing the content of the shared channels presents the opportunity for discrimination by an OVS operator. Selection for carriage on a shared channel will provide a substantial economic advantage for programming providers, and rejection may foreclose participation by certain disfavored programmers. The Commission must assure that LECs are not able to favor their programming affiliates, or others who might

pay them tribute, by placing them on shared channels under discriminatory circumstances.[14]

In reaching its tentative conclusion, the Commission refers to legislative history accompanying the Act that posits "flexibility" in entry options for LECs as a goal of the Act, and of the OVS provisions.[15] With its tentative conclusion that LECs operating OVSs should be allowed to allocate capacity, however, the Commission overstretches the goal of flexible entry options. Under the Act, LECs are given the option of providing video programming directly to subscribers in any of three ways: (1) via radio communication under Title III of the Act; (2) via a "closed" cable system pursuant to Title VI of the Act; or (3) via an open video system under new Section 653 of the Act.[16] These entry options are what give LECs flexibility. Indeed, only by fully quoting the sentence the Commission repeatedly reduces to the phrase "to tailor services to meet the unique competitive and consumer needs of individual markets," may the true intent of Congress be divined. That sentence states as follows: "The conferees recognize that telephone companies need to be able to choose from among multiple video entry options to encourage entry, and so systems under this section [sic]allowed to tailor services to meet the unique competitive and consumer needs of

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[14] At a minimum the Commission must ensure that the provisions regulating carriage agreements, 47 U.S.C. § 536; 47 C.F.R. § 76.1300 *et seq.*, fully apply to OVS operators. Indeed, the carriage agreement restrictions could be easily circumvented if the LEC had the authority to choose among potential lessees for favored treatment.

[15] NPRM, ¶ 10; *see* Joint Explanatory Statement of the Committee of Conference ("Conference Report"), 142 Cong. Rec. H1125 (daily ed. Jan. 31, 1996).

[16] Act § 651. The Act also provides that LECs may enter the video marketplace by providing video transmission facilities on a common carrier basis (*i.e.*, channel service), but that is not an option for providing video programming directly to subscribers.

individual markets."[17] This statement demonstrates that Congress intended to allow LECs to "meet the unique competitive and commercial needs of individual markets" by providing them choices between cable, OVS, and wireless transmission technologies, not choices of programmers on the "open" system created by OVS.

Yet, by proposing to allow LECs to control the allocation of capacity on their OVSs, the Commission seeks not to provide a flexible entry option, but to impermissibly reconfigure the options set forth by Congress. If a LEC seeks "flexibility in the structuring of services offered over [its] system[]," [18] it may choose to provide service via the Title VI cable model. Allowing OVS operators to control the allocation of capacity, and thus inherently discriminate among programmers, is not what Congress intended when it referred to providing LECs flexibility in entering the video marketplace.

Further, allowing a LEC to control the capacity programmers receive and favor its affiliate would undermine the policies of the 1996 Act. As the Commission noted, one public interest benefit that should develop from OVS is intra-system competition. By providing a platform where multiple programmers and packagers can offer video services to consumers, OVS should create competition within the system itself. If the LEC OVS operator is permitted to control allocation of capacity, and favor its affiliate in that allocation, or extract concessions from programmers in return for capacity, intra-system competition will

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[17] Conference Report, 142 Cong. Rec. H1125 (daily ed. Jan. 31, 1996).

[18] NPRM, ¶ 10.

not develop. Moreover, the open nature of the OVS was the basis of Congress' decision to decrease the regulatory burden on OVS operators.[19] The Conference Report states that "the conferees hope that [decreasing regulatory burdens] will encourage common carriers to deploy open video systems and introduce vigorous competition in entertainment and information markets."[20] "Encouragement," however, does not include elimination of oversight. Allowing OVS operators to control allocation of capacity would undermine the "openness" of the system and in turn the rationale for decreased regulation. Moreover, Congress has already spoken on the degree of deregulation that it wishes to use to encourage LECs to provide OVS. Although expedient, the Commission should not be deregulating OVS in conflict with Congress' chosen method of deregulation.

B. OVS Operators May Not Exercise Any Discretion, Influence, Or Control Over The Identity Of Programmers Leasing Capacity On Their System Or The Amount Of Capacity Such Programmers May Obtain

The Commission also seeks comment on "the extent to which open video system operators should have discretion regarding the identity of video programming providers entitled to carriage on its system."[21] Once again, the Commission cites Congress' intent that OVS operators be allowed to "'tailor services to meet the unique competitive and consumer needs of individual markets'"[22] as the source for this issue. As demonstrated above,

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[19] Conference Report, 142 Cong. Rec. H1126 (daily ed. Jan. 31, 1996).

[20] *Id.*

[21] NPRM, ¶ 15.

[22] NPRM, ¶ 15 (citing Conference Report at 177).

however, the Commission's statement of the issue indicates a misunderstanding of what flexibility LECs are to be afforded. The fundamental underpinning of an "open" video system would be destroyed by allowing the LEC operator to pick-and-choose the programmers allowed on the system. Indeed, that state of affairs essentially would be a "closed" cable system, but without the other cable system obligations. The Commission must act decisively to halt any such degradation of the OVS concept by adopting a rule prohibiting OVS operators from limiting or precluding the ability of any video programming provider or packager, including the competing cable operator, to obtain capacity on the OVS.[23]

In addition, in the NPRM, the Commission seeks comment on whether it should permit OVS operators to prescribe minimum and maximum amounts of capacity that an unaffiliated programmer may obtain.[24] Such a situation would be just as problematic as allowing the OVS operator to control which programmers obtained access. For example, if allowed, an OVS operator could set the maximum channel limit so low that programmers would be discouraged from participating on the system. Thus, the OVS operator would protect against oversubscription and leave more capacity for its affiliated programmer. Similarly, by setting a high minimum subscription level, the OVS operator could eliminate the opportunity for smaller, independent programmers to offer their programming to subscribers — again, leaving more capacity for the OVS operator's affiliate to occupy.

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[23] 1996 Act § 653(a)(1); *see infra* Section V (discussing cable operator access to OVS capacity).

[24] NPRM, ¶ 20.

Allowing LECs to set minimum channel and time periods for leasing would cause competitive inequity. Under the 1992 Cable Act, and the Commission's Rules implementing it, cable operators must offer commercial leased access customers the opportunity to purchase capacity for as little as 1/2 hour.[25] The 1996 Act freed OVS operators from the Cable Act's leased access provisions because an "open" video system, theoretically, would be subject to the same requirements and burdens as cable operators providing commercial leased access. The Commission must not abandon this fundamental underpinning of OVS. OVS operators cannot be allowed to manipulate the competitive environment by setting minimum or maximum channel quantities or length of lease. OVS operators must make capacity available to any qualified programmer, in any quantity that is available under generally applicable channel allocation rules adopted by the Commission.[26] Moreover, OVS operators should be required to make capacity available in the same minimum increments as imposed under the Commission's commercial leased access rules.

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[25] 47 C.F.R. § 76.971(g).

[26] Indeed, this is simply further evidence of why the Commission must adopt specific rules dictating the allocation of OVS capacity. Without such Commission rules, numerous discrimination complaints will be filed. For example, assume a programmer ("Programmer A") requests 100 channels of capacity, but the OVS operator only allocates Programmer A 30 channels, while other programmers subscribing to the OVS were allocated the full amount of channels they requested. It may well be that the other programmers received their full requests for some legitimate reason, but without specific Commission adopted guidelines regarding the grounds for allocation, Programmer A will have a *prima facie* claim that it was discriminated against by the OVS operator. The constant flow of complaints from programmers who have not received their full requests for capacity could overwhelm the Commission.

III. THE COMMISSION SHOULD ADOPT SPECIFIC CHANNEL ALLOCATION REGULATIONS

In the NPRM, the Commission suggests that it should not adopt specific rules regarding the allocation of channel capacity on OVSs. Rather, the Commission appears to believe that it should adopt a generic prohibition on discrimination by OVS operators against unaffiliated programmers, and then rule on individual complaints filed under that prohibition.[27] Such an approach, however, would significantly harm the development of competition. Moreover, it would leave numerous critical issues, which the Commission itself has recognized, unresolved and entirely in the control of one of the competing parties. The Commission must adopt specific rules governing the allocation of capacity on OVSs.

A. Specific Channel Allocation Rules Are Required To Protect Competition, Consumer Choice, And The Diversity Of Media Voices

The purposes of Section 653's requirement that the Commission prohibit discrimination by OVS operators are to promote diversity in media voices, increase consumer choice, and advance competition in the video services marketplace. The Commission, however, appears mainly concerned with the interests of LECs that might choose to deploy OVSs. The Commission states as follows: "[a generic rule] would provide operators with maximum business flexibility. In addition, this approach may be the most effective in encouraging telephone companies to begin providing service over open video systems."[28] In a sense, the Commission is correct: placing the burden for showing discriminatory conduct on

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[27] NPRM, ¶ 12.

[28] NPRM, ¶ 12.

harmed programmers will encourage LECs to construct and operate OVSs because they will be able to discriminate with little possibility of detrimental consequences. Yet, as explained above, the Commission has misinterpreted the legislative history regarding flexibility for LECs, and Congress has already chosen to encourage telcos to provide OVS by mandating specifically reduced regulatory burdens.

Independent programmers, many of whom may be small or start-up companies, cannot afford the expense of litigating discrimination complaints before the Commission and courts. That is particularly true considering that the discrimination may be prohibiting the programmer from accessing the system, and thus subscribers and revenues, while the complaint is pending. Such a situation would create a substantial if not fatal financial hardship for programmers. Thus, a LEC could discriminate against a programmer, knowing that the programmer may not be financially capable of fighting the discrimination. Indeed, even if a programmer were to ultimately prevail and gain carriage on non-discriminatory terms, how will the LEC have suffered? It will have succeeded in deterring a competitor to its own programming affiliate for months or even years. Again, the Commission must recognize that LECs have been provided "flexibility and independent business discretion:"[29] if they want to control all of the composition of programming on their system, they may choose to operate a cable system pursuant to Title VI. Otherwise, LECs may only exercise programming flexibility with regard to the block of channels they, or their affiliate, lease on the OVS.

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[29] NPRM, ¶ 13.

In the NPRM, the Commission expresses concern that adopting specific rules would be too burdensome.[30] The Commission, however, must recognize that the initial burden of adopting such rules, and the burden on OVS operators initially implementing them, will be small in comparison to the burden that will be imposed on the Commission, OVS operators, and programmers by the constant wave of complaints that would result from a lack of guidance by the Commission. The Commission should take a lesson from the cable commercial leased access situation, where even with set rules on rates, the Commission has received numerous complaints. If in OVS, the Commission were to adopt no rate formulas or cost allocation rules, it would essentially be inviting even more complaints, which would tax the resources of the Commission, OVS operators, and the harmed programmers. Set rules on channel allocation, cost allocation, and rate setting, by comparison, would create stability, and allow OVS operators, OVS programmers, competitors, and the ratepaying public a greater level of comfort. The long-term benefits of specific rules, therefore, outweigh the long-term costs, as well as the short-term burdens.

B. The Commission Must Prohibit LECs From Discriminating In Favor Of Their Programming Affiliates In The Allocation Of Analog Channels

In the NPRM, the Commission seeks comment on whether an OVS operator's allocation of all the system's analog capacity to its programming affiliate would constitute discrimination.[31] The answer is an unqualified "yes". Digital video delivery and reception

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[30] NPRM, ¶ 13.

[31] NPRM, ¶ 21.

systems are still generally unavailable, and the time frame for their development and release is unclear. Recent reports estimate that the cost of set-top boxes required to convert compressed digital signals for viewing on analog television sets still exceeds $500 per unit. Accordingly, the analog capacity of OVSs is going to be most desirable to programmers, if not, in the short run, the only viable delivery option. By allocating all of the analog channels to its programming affiliate, an OVS operator would be discriminating against unaffiliated programmers, who would be receiving useless capacity for some time. In order to protect unaffiliated programmers from such discrimination, when adopting rules regarding the allocation of capacity, the Commission must adopt a rule which recognizes the practical difference between analog and digital capacity.

C. The Commission Must Adopt Rules Which Mandate Non-discriminatory Allocation Of Channel Positions

In the NPRM, the Commission seeks comment on whether the allocation of particular channel positions raises discrimination concerns.[32] The answer, again, is yes. As the Commission recognizes, numerically lower channel positions are recognized as far more attractive to programmers because they attract greater audience shares.[33] Indeed, Congress recognized the importance of channel positioning in the 1992 Cable Act, which requires cable operators to carry broadcast stations on the same numerical channel as their designated over-the-air signal.[34] Accordingly, if an OVS operator were to allocate its programming affiliate,

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[32] NPRM, ¶ 22.

[33] NPRM, ¶ 22.

[34] 47 U.S.C. § 534(b)(6).

or some other favored programmer, the lowest channel numbers on the system (*e.g.*, numbers 2-80), it would constitute discrimination. To remedy this potential problem, the Commission, as described above, must first prohibit OVS operators from exercising any control over the allocation of capacity. Second, in adopting its channel allocation rules, the Commission must provide a specific procedure that will assure a non-discriminatory assignment of the most attractive channels. For example, the Commission could provide that channel positions will be assigned initially by lottery.[35]

IV. THE COMMISSION MUST FULLY EFFECTUATE THE ACT'S MANDATE THAT THE RATES, TERMS, AND CONDITIONS FOR OVS ACCESS ARE JUST AND REASONABLE AND NOT UNJUSTLY OR UNREASONABLY DISCRIMINATORY, AND THAT OVS NOT BE CROSS-SUBSIDIZED

Section 653(b) of the 1996 Act explicitly requires the Commission to adopt regulations that "*ensure* that the rates, terms, and conditions for [OVS] carriage are just and reasonable, and not unjustly or unreasonably discriminatory."[36] The new Act also provides that "a telecommunications carrier may not use services that are not competitive to subsidize services that are subject to competition."[37] To ensure that such cross-subsidization does not occur, the Act requires the Commission to "establish any necessary cost allocation rules,

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[35] Any programmer seeking capacity after the initial assignment would be required to take whatever channel positions are available at the time. However, the Commission must assure that LECs do not manipulate such a process by arranging for their programming affiliate to be the only programmer in the initial lottery, thus locking-up the best channel positions before any other programmer accesses the system.

[36] 1996 Act § 653(b) (emphasis added).

[37] 1996 Act § 254(k).

accounting safeguards, and guidelines. . . ."[38] The Commission's mission, therefore, is clear. Only cost allocation requirements and pre-service price filings can ensure that rates are reasonable and services are not cross-subsidized. And only through separate subsidiary requirements can the Commission enforce cost allocation requirements. Yet, in the NPRM, the Commission appears ready to abdicate its responsibility, preferring to leave the setting of rates, terms, and conditions of OVS almost entirely to market forces.[39] Such an approach would be in direct violation of the terms and policies of the 1996 Act, and would place competition and the public interest at substantial risk.

The Commission was on the correct track when it suggested, in the NPRM, that it adopt a formula for setting rates for OVS carriage.[40] The Commission must establish a specific framework for determining the justness and reasonableness of OVS rates, terms, and conditions. While leaving the pricing of OVS to LECs would, as the Commission suggests, encourage entry, it will create an incredible potential for, indeed likelihood of, misconduct. For example, if the Commission were to adopt its proposal to allow only periodic enrollment periods, a LEC initially could radically overprice its OVS system, thus assuring that only its programming affiliate would apply to obtain capacity. Then after the capacity allocation was set for the next several years, the LEC could radically underprice its OVS service, thus facilitating its programming affiliate's predatory pricing of video services. While the

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[38] *Id.*

[39] NPRM, ¶¶ 31-32.

[40] NPRM, ¶ 32.

preceding may seem like an extreme scenario, it demonstrates the potential for mischief that will arise if the Commission fails to properly follow the Act's mandate that the Commission ensure that rates are reasonable.

In addition, in the NPRM, the Commission asks "whether an open video system operator should be required to charge rates that are no greater than the rates it charges its affiliated programmers."[41] There can be no reasonable justification for allowing a LEC to discriminate in favor of its programmer-affiliate in charges for use of the system. Such a situation would completely undermine the advancement of fair competition, and indeed raises substantial issues under the federal antitrust laws. The Commission must make clear that under no circumstances may an OVS provider favor its programming affiliate in rates, terms, or conditions for access to the system.

V. CABLE OPERATORS ARE ALLOWED TO BECOME OVS PROVIDERS OR TO LEASE CAPACITY ON LECS' OVSs

In the NPRM, the Commission questions whether the 1996 Act permits cable operators to provide video programming over a LEC's OVS, and whether it permits cable operators to become OVS operators themselves.[42] The explicit language of the 1996 Act specifically requires the Commission to allow both. As the Commission recognizes, Section 653(a)(1) specifically states that "an operator of a cable system or any other person may

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[41] NPRM, ¶ 31.

[42] NPRM, ¶ 64; *see also* NPRM, ¶ 15.

provide video programming through an open video system that complies with this section."[43] That Section allows cable operators to utilize the OVS of a LEC to transport video programming because the language does not specify that the OVS must be owned by the cable operator. It simply allows a cable operator, like any other person, to transport video programming over any OVS certified under Section 653.

Similarly, the language authorizes cable operators to provide video programming to subscribers using an OVS the cable operator owns and operates. There is no explicit or implied limitation requiring cable operators to use only a LEC's OVS. Indeed, Section 653 uses nearly identical language in authorizing LECs to provide video programming to subscribers over an OVS. And while the Commission expresses concern that Section 653 uses "cable service" to describe what a LEC may provide over an OVS, and "video programming" to describe what cable operators may provide over an OVS, it is clear that Congress intended for cable operators to be afforded the same opportunity to become OVS operators as LECs. Moreover, Section 653 requires that cable operators be allowed to access OVSs pursuant to the public interest. If the public interest applies to OVS at all, then OVS must be open to all users — even the fiercest competitors.

A comparison with other Sections discussing LECs' entry into OVS demonstrates that the difference in terminology in Section 653(a) was unintentional. In Section 651(a)(4), the Act discusses a LEC that is "providing *video programming*" electing to

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[43] 1996 Act § 653(a)(1).